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October 15, 1998

BY MESSENGER

Magalie Roman Salas
Secretary, Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: CC Docket No. 98-141

Dear Secretary Salas:

Pursuant to the Commission's notices of July 30, 1998, and September 1, 1998, I am hereby submitting in the above-captioned matter an original and twelve copies of the Petition of AT&T Corp. To Deny Applications. Please contact me if there are any questions regarding this Petition. Thank you for your attention to this matter.

Sincerely,

C. Frederick Beckner III

Enclosures

cc: ITS, Inc.
Chief, Policy and Program Planning Division (2 copies)
Chief, International Bureau (2 copies)
Jeanine Poltronieri, Wireless Telecommunications Bureau
Chief, Commercial Wireless Division

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent	)	
to the Transfer of Control of Licenses and	)	
Section 214 Authorizations from	)	CC Docket No. 98-141
	)	
AMERITECH CORPORATION,	)	
Transferor	)	
to	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	

PETITION OF AT&T CORP. TO DENY APPLICATIONS

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October 15, 1998

TABLE OF CONTENTS

SUMMARY

It has now been nearly three years since the Telecommunications Act of 1996 ("the Act") was enacted and there is still no meaningful local exchange competition. During that time, the Commission has approved mergers that have resulted in the number of Regional Bell Operating Companies ("RBOCs") shrinking from seven to six to five. While each time the merging RBOCs have promised that their combination would further the pro-competitive purposes of the Act, these mergers have done nothing but create larger, better financed bottleneck monopolists.

Against this backdrop, Ameritech Corp. ("Ameritech") and SBC Communications Inc. ("SBC") (collectively "Applicants") now seek to merge and reduce further the number of RBOCs to four. If allowed to proceed, the resulting super-RBOC -- with annual revenues of $43 billion, annual net income of $4 billion and market capitalization of over $120 billion -- would have exchange monopolies from Michigan to Texas and to the nation's most populous state, California. Moreover, as this merger is being considered, a similarly monolithic deal between Bell Atlantic Corp. ("Bell Atlantic") and GTE Corp. is also pending. If consummated, these transactions would for all practical purposes consolidate and allocate the nation's local telephone customers between two huge local exchange monopolies: in effect, Bell East and Bell West.

While Applicants claim that this combination will, at last, fulfill the promise of the Act, in reality the merger, like the others, is designed to ensure that consumers continue to have no real choices for local phone service well into the future. Thus, Applicants are all too accurate when they state that this merger is the "logical and necessary next step" in their response to the competitive forces unleashed by the Act. Application at 1. By combining and shielding their monopoly markets from the most powerful, imminent source of competition -- each other -- Applicants can continue to foreclose the development of local competition by others and further

entrench their monopoly power. In fact, this merger is simply the culmination of Ameritech's and SBC's relentless campaign to deny consumers the benefit of meaningful competition in their respective regions. But Applicants' private interest in shielding their monopolies from erosion is patently insufficient to justify the proposed Applications.

Rather, in order to obtain Commission approval to transfer the licenses at issue in this proceeding, Applicants must affirmatively demonstrate that their proposal "serves" the "public interest." 47 U.S.C. § 310(d). Here, that means Applicants must prove that their merger *enhances* competition. *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation*, 12 FCC Rcd. 19985, ¶¶ 2-3 (1997) ("*BA-NYNEX Merger Order*"). Moreover, in the wake of the acquisition of NYNEX Corp. by Bell Atlantic, Applicants must meet "an *additional* burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity." *Id.* ¶ 16 (emphasis added).

As demonstrated below, Applicants have failed to demonstrate any public interest benefits from the merger, let alone the additional benefits they must show in order to further reduce the number of RBOCs. Nor could they. The proposed merger is patently anticompetitive and would, in at least four independent respects, "eliminate or retard competition" in the local telephone market and in the adjacent long distance market. *Id.* ¶ 48.

First, as the Commission is well aware, Applicants' markets remain tightly closed as a result of their steadfast resistance to the market-opening requirements of the Act. As proven by SBC's acquisition of the Pacific Telesis Group ("PacTel"), approval of this merger will only strengthen Applicants' commitment to that course and their ability to pursue it by allowing them to share "best practices" regarding the separate ways in which Ameritech and SBC have each

used its monopoly power to foreclose the emergence of local competition. And having proposed to pay a hefty $13 billion premium to acquire Ameritech's monopolies, Kahan Aff. ¶ 58, the last thing SBC would want is to see its newly purchased monopolies dissipated by competition. Indeed, Applicants trumpet the fact that an effect of this merger will be to strengthen their position in the in-region markets against potential competitors. Application at 4-5. Applicants are simply wrong, however, in assuming that the strengthening of monopolists should be a goal of public policy or could serve the public interest.

Second, by directly and permanently eliminating the most likely entrant into Ameritech's and SBC's territories, the merger greatly increases Applicants' ability to exercise market power. As the Commission recognized in this very context, "[a] merger that eliminates a significant market participant" enables a bottleneck monopolist to "raise prices, reduce quality, or restrict output profitably." *BA-NYNEX Merger Order* ¶ 101 (citing authorities). This merger not only formally re-establishes Applicants' prior comfortable relationship, it also stabilizes and enforces the cooperative arrangement among the remaining RBOCs.

Third, the merger would eliminate the independent decisionmaking between two of the largest incumbent local exchange carriers that could be the source of benchmarks that would accelerate the development of local competition not only in these two regions, but also nationally. As Ameritech itself has recognized, "[n]o amount of sophistry can suppress the importance of benchmarks."[1] That is because the creation of numerous RBOCs as part of the Bell System divestiture was critical to providing federal and state regulators a valuable tool in evaluating RBOCs' compliance with their regulatory requirements. And the existence of many independent

[1] Ameritech Response to Comments on the Report and Recommendations of the United States Concerning the Line of Commerce Restriction, Civil Action No. 82-0192, at 23 (D.D.C. Apr. 24, 1987).

RBOC decisionmakers is even more important today than it was in 1984, given the Act's mandate to promote local exchange competition and the tenacity with which the RBOCs have fought to prevent such competition from taking hold.

Fourth, beyond the exercise of monopoly power in local exchange markets, the merger would enhance the Applicants' ability to leverage that monopoly power into related markets. So long as Applicants can continue to use their bottleneck monopolies to impose inflated access charges on interexchange carriers, Applicants would be able to subject their long distance competitors to anticompetitive price squeezes. The merger substantially enhances Applicants' ability to effectuate such price squeezes by giving Applicants substantially increased control over both the origination *and* termination of the interLATA calls that would originate in the combined region. Applicants' expanded ability to impose monopoly access charges over both ends of phone calls also creates an even greater distortion in the market for local exchange services that the Act seeks to open -- and even greater barriers to entry in that market.

Nor are there any countervailing pro-consumer benefits to this transaction. To begin with, given the overwhelming evidence that the merger will allow Applicants to further entrench their local monopolies and leverage those monopolies into the long distance market, Applicants' claims regarding the public benefits arising from the merger, even if they were true, would be wholly insufficient to render the merger in the "public interest." In all events, those claims are contrived and substantially overblown. The merger will not materially enhance out-of-region competition, global competition, or produce significant cost savings. Indeed, all the claimed benefits from the merger could easily be obtained independent of the merger.

Although out-of-region local entry by Ameritech and SBC would be in the public interest, Applicants' so-called "National-Local" strategy is not. Rather, it is a cynical attempt by

Applicants to give a competitive gloss to an otherwise blatantly anticompetitive merger. As demonstrated below, the economic assumptions purporting to underly the "National-Local" strategy have no empirical basis but have simply been "reverse-engineered" to justify the merger. When examined closely, the testimony of Applicants' own witnesses confirms that Ameritech and SBC could each undertake 15 out-of-region markets and establish a "national footprint" *without* the merger. Thus, the merger will produce no out-of-region local competition, while at the same time eliminating the only RBOC-on-RBOC competition that had developed to date.

Likewise, the merger will do little for global competition. Ameritech's $6 billion investment in Europe makes it the *largest* U.S. presence in that continent while SBC is a major international player too. The value of merging two already well-positioned competitors, in a market with at least twelve other competitors is, at best, *de minimis*.

Lastly, the merger will generate few cognizable cost savings. This Commission has already recognized that the routine type of cost-savings claimed by Applicants can be undertaken independent of a merger by simply operating more efficiently, *BA-NYNEX Order* ¶¶ 161-64 -- improvements Ameritech and SBC would have to make if they competed rather than merged. Indeed, Applicants effectively admit as much by saying that they can cut costs simply by adopting "best practices" on basic managerial and operational practices. Nor will consumers benefit by Applicants' decision to stop competing with each other in research and development.

* * *

Because the harmful effects of the merger are so substantial, and the benefits non-existent, no difficult balancing is required to evaluate this transaction under the Commission's governing standard. The Applications should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from AMERITECH CORPORATION, Transferor to SBC COMMUNICATIONS INC., Transferee	))))))))))	CC Docket No. 98-141

PETITION OF AT&T CORP. TO DENY APPLICATIONS

Pursuant to the Public Notices issued by the Commission on July 30, 1998 and on September 1, 1998, AT&T Corp. ("AT&T") respectfully submits this petition to deny the joint Applications of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") (collectively "Applicants") for authority to transfer control of Ameritech's licenses to SBC.

INTRODUCTION

This Application must be assessed in the context of a market structure of which the Applicants have been the chief architects. Had SBC and Ameritech over the last two and a half years taken the steps the law requires to open their monopoly local markets to competition, and had this application therefore been filed in a competitive environment, the proposed consolidation would present different issues. The concerns the Commission has properly expressed about its ability to regulate effectively in the face of Regional Bell Operating Company ("RBOC") mergers, for example, would be less salient, because market forces, when they are allowed to

work, provide a powerful check on anticompetitive conduct. Competition would also be driving access charges to cost, as the Commission had hoped, and would thus be reducing the combined entity's ability to use its control over access to create price squeezes that would harm consumers in the long distance market and to cross-subsidize the local retail services that are most vulnerable to competition by new entrants. The elimination of Ameritech and SBC as actual or potential competitors of the other would likewise be less problematic, given the presence of other active sources of meaningful competition. And even Ameritech's and SBC's startling claim that they seek to merge in order to strengthen their position within their own regions, while still likely to raise eyebrows, could at least be viewed in that context as carrying somewhat less threatening implications.

But that does not remotely describe the world in which these Applications have actually been filed. It has now been nearly three years since the Telecommunications Act of 1996 ("the Act") was enacted, and SBC and Ameritech remain monopolies that continue to wage successful campaigns of massive resistance to the market-opening requirements of the Act. During that same time, the Commission has approved mergers that have resulted in the number of RBOCs shrinking from seven, to six, to five. Even when there were seven RBOCs, new entrants faced significant barriers to competing successfully in the local market. And these RBOC mergers, by giving the combined entities even greater pools of access and other monopoly profits with which to entrench their bottleneck monopolies and by increasing even further the RBOCs' incentives to preserve those monopolies in order to justify these massive investments, strengthen these barriers even more. In short, while each time the merging RBOCs have promised that their combination would further the pro-competitive purposes of the Act, these mergers have done nothing but create larger, better financed monopolists.

And now, just when it seemed that Ameritech had overcome its historic aversion to competing with a sister RBOC in a core market -- and would create the type of competition that would break through SBC's local exchange bottleneck -- Ameritech and SBC instead ask this Commission for permission to reduce the number of RBOCs to four. The result: a super-RBOC -- with annual revenues of $43 billion, net income of $4 billion, and market capitalization of over $120 billion -- controlling exchange monopolies from Michigan to Texas (including the nation's most populous State, California) that include approximately 40 percent of the total population of the United States. Applicants are thus unfortunately correct when they describe this transaction as the "logical and necessary next step." Application at 1. The central question presented by their Application is whether there is any stopping point to this anticompetitive process.

Applicants makes no serious attempt to grapple with and confront these fundamental issues. Indeed, the Applicants' assertion that they need this merger in order "effectively [to] compete with the myriad highly visible, technically proficient and well financed competitors who are in our markets today," Application at 5, betrays instead their apparent contempt for the Commission, for the facts, and for the public interest. As the Commission is aware, Ameritech and SBC have ensured that there are, as of yet, no significant and successful competitors in their regions. And while SBC and Ameritech are correct that this merger would strengthen their hand enormously within those regions against new entrants struggling to gain a toehold, that is assuredly not a goal of public policy. The objective of the Act was to eliminate their monopolies; it was not to help them build their walls even higher.

In order to transfer the licenses at issue in this proceeding, Applicants must prove that their merger would serve the public interest and *enhance* competition. In practice, that standard

requires the Commission to weigh the beneficial and harmful aspects of a transaction and determine which outweighs the other. In this instance, it is not even a close call.

On the one hand, the anticompetitive consequences of the merger are substantial and irrefutable. It would enable the Applicants to share "best practices" on how to exclude competitors -- as SBC likewise demonstrated when it acquired the Pacific Telesis Group ("PacTel"). It would eliminate the most likely near-term entrant into each Applicant's territories: the other Applicant. It would likewise eliminate the independent decisionmaking between two of the largest incumbent local exchange companies ("LECs") that serve as a source of benchmarks that would accelerate the development of local competition not only in these two regions, but also nationally. In this and other ways, it would make it significantly more difficult, if not impossible, for the Commission to carry out its regulatory responsibilities and continue to address the enormous challenge of opening these historically closed markets. And by substantially increasing Applicants' control over both the origination *and* termination of the interLATA calls that would originate in the combined region, the merger would enhance their ability to leverage their local monopoly power into the adjacent long distance market by subjecting their future long distance competitors to anticompetitive price squeezes, as well as strengthening their ability to ward off local competitors through cross-subsidizing retail prices.

And here there is no "other hand." Given the overwhelming evidence that the merger will allow Applicants to further entrench their local monopolies and leverage those monopolies into the long distance market, their claims regarding the putative public interest benefits arising from the merger, even if true, would be wholly insufficient to render the merger in the "public interest." In all events, each of those claims is either contrived, trivial, or both. The centerpiece of those claims -- the "National-Local" strategy in which the combined SBC-Ameritech would enter other

local markets -- is particularly hollow. The only significant commitment Applicants have made to engage in out-of-region entry is the commitment that this merger nullifies -- Ameritech's commitment to compete with SBC. By contrast, once the fine print is examined in these Applications, it is clear that Applicants have made no meaningful commitments actually to provide significant out-of-region competition post-merger, and that their so-called "strategy" is built upon arbitrary assumptions that have no economic basis and were simply "reverse-engineered" to justify the merger. Most tellingly, when examined closely, the testimony of Applicants' own witnesses confirms that Ameritech and SBC could each enter 15 out-of-region markets and establish a "national footprint" *without* the merger. Indeed, *all* the claimed benefits from the merger -- not only the out-of-region local entry, but also the supposed strengthening of global competition and the achievement of incremental operational efficiencies -- could easily be obtained even if Applicants maintained their separate identities, and thus can have no bearing on whether the merger should be approved. In short, the merger will produce no out-of-region local competition while at the same time eliminating the only RBOC-on-RBOC competition that had developed to date.

A merger that is so patently designed to raise rather than lower barriers to entry, and to shield monopoly profits from erosion rather than foster competition, presents a straightforward case under the "public interest" standard. These Applications should be denied.

ARGUMENT

The standard for reviewing this Application is well established. In order to transfer the licenses at issue in this proceeding, Applicants must affirmatively demonstrate that their proposed merger enhances competition. *Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation*, 12 FCC Rcd. 19985, ¶¶ 2-

3 (1997) ("*BA-NYNEX Merger Order*"). Moreover, in approving the merger between Bell Atlantic Corp. ("Bell Atlantic") and NYNEX Corp. ("NYNEX"), the Commission stated that, in light of the "impact of the declining number of large incumbent LECs on [the] Commission's ability to carry out properly its responsibilities to ensure just and reasonable rates, to constrain market power in the absence of competition, and to ensure the fair development of competition," all subsequent such applicants must meet "an *additional* burden [beyond that applied to Bell Atlantic and NYNEX] in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity." *BA-NYNEX Merger Order* ¶ 16 (emphasis added); *see also* "Consumers First," Remarks of Commissioner Susan Ness Before the Consumer Federation of America Utility Conference, at 5 (Oct. 1, 1998) ("Remarks of Commissioner Ness") ("We must, and we will, review [RBOC mergers] carefully. We must, and we will, ask hard questions. We must, and we will, center our public interest analysis on the likely effects on competition and on consumers.").

Under that standard, or any other that focuses on the public interest, this merger cannot be defended or approved. As demonstrated below, the consolidation of SBC and Ameritech holds no prospect of enhancing competition, but, to the contrary, would substantially harm competition in both local and long distance markets and disserve the public interest.

I. THE MERGER WOULD FURTHER IMPEDE EFFORTS TO OPEN TO COMPETITION THE MONOPOLY LOCAL MARKETS IN AMERITECH'S AND SBC'S TERRITORIES AND WOULD ENHANCE THEIR ABILITY TO LEVERAGE THAT MONOPOLY POWER INTO OTHER MARKETS

In its *BA-NYNEX Merger Order*, the Commission recognized the significant barriers to entry that exist in local exchange and exchange access markets. *BA-NYNEX Merger Order* ¶ 42. These barriers include the staggering costs of the assets necessary to enter, the specialized service skills needed to operate a local exchange network, and the need to achieve a substantial market

share to achieve economies of scale. These barriers would exist even if -- contrary to fact -- the Act had been fully and faithfully implemented by Applicants. *Id.*

Thus, in order to assess whether a merger is anticompetitive, the Commission must determine whether there are likely market participants that can overcome these significant entry barriers and check the exercise of market power by the combined entity -- either from unilateral or coordinated action. *Id.* ¶¶ 45-46. In addition, the Commission must determine whether the merger reduces its ability "to develop and enforce pro-competitive rules necessary to achieve competition and deregulation." *Id.* ¶ 47. These concerns take on a "special significance" when, as here, the merger involves the acquisition of a potential new entrant by an incumbent monopolist because "[e]ven if [the potential new entrant] seems clearly to be one of several firms which are 'equally probable' potential entrants, it is important to preserve all those significant possibilities of eroding the monopoly, and to prevent possible reinforcement of the monopolist's position via the assets acquired." *Id.* ¶ 66 n.155 (quoting 3 Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 170d at 134-36 (1996)).[2]

As demonstrated below, the Commission must reject these Applications because they are patently anticompetitive and would, in at least four independent respects, "eliminate or retard competition" in the local telephone markets in which SBC and Ameritech maintain bottleneck control and in the adjacent long distance market. *Id.* ¶ 48. *First*, the Commission can quickly dismiss the Applicants' farfetched claims that the merger is "necessary to . . . enable" them to "complete the opening of our local markets to competition" and to "effectively compete" with the

[2] Likewise, a merger, even if it "does not decrease the current level of competition," "does *not* serve the public interest" if it "impede[s] the development of *future* competition." Memorandum Order and Opinion, *Application of WorldCom, Inc. and MCI Communications Corp.*, CC Docket No. 97-211, ¶ 4 (FCC Sep. 14, 1998) (emphasis added).

"myriad" competitors in those markets. Application at 4-5. As the Commission is well aware, Applicants' markets remain tightly closed as a result of their steadfast resistance to the market-opening requirements of the Act. Approval of this merger will only strengthen their commitment to that course and their ability to pursue it. Having proposed to pay a $13 billion premium to acquire Ameritech's monopolies, Affidavit of James Kahan ("Kahan Aff.") ¶ 58 (Application, Tab 6), the last thing SBC would want to see is these newly purchased monopolies dissipated by competition. Indeed, given Applicants' conduct to date, the only "best practices" Applicants could intend to share are the separate ways in which each has used its monopoly power to foreclose the emergence of local competition.

Second, by directly and permanently eliminating the most likely near-term entrant into each Applicant's territories, the merger greatly increases both Applicants' ability to exercise market power. As the Commission recognized in this very context, "[a] merger that eliminates a significant market participant" enables a bottleneck monopolist to "raise prices, reduce quality, or restrict output profitably." *BA-NYNEX Merger Order* ¶ 101 (citing authorities). Likewise, by eliminating the most likely and most significant entrant into each carrier's territory, the merger would enhance Applicants' ability to maintain the status quo in which no RBOC competes against another in the local markets. *Id.* ¶ 121 (eliminating the most likely significant entrant gives the remaining firms increased ability "to arrive at mutually beneficial market equilibria, to the detriment of consumers"). This effect is particularly problematic here both because of the RBOCs' history of cooperation and because of the local industry's market structure, which facilitates the formation and policing of agreements to cartelize markets. *See* Department of Justice/Federal Trade Commission 1992 Horizontal Merger Guidelines § 2.12, *reprinted in* 4 Trade Reg. Rep. ¶ 13,104 (1992) ("DOJ/FTC Horizontal Merger Guidelines").

Third, the merger would render effective regulation of the four remaining RBOCs much more difficult, if not impossible. As Ameritech itself has recognized, "[n]o amount of sophistry can suppress the importance of benchmarks."[3] The creation of numerous RBOCs was thus a critical element of the AT&T divestiture because, among other benefits, it provided federal and state regulators a valuable tool in evaluating RBOCs' compliance with their regulatory requirements. And the existence of many independent RBOC decisionmakers is even more important today than it was in 1984, given the Act's mandate to promote local exchange competition and the tenacity with which the RBOCs have fought to prevent this from happening.

Finally, beyond the exercise of monopoly power in local exchange markets, the merger would enhance the Applicants' ability to leverage that monopoly power into related markets. So long as Applicants can continue to use their bottleneck monopolies to impose inflated access charges on interexchange carriers, Applicants would be able to subject their long distance competitors to anticompetitive price squeezes. The merger substantially enhances Applicants' ability to effectuate such price squeezes by giving Applicants control over both the origination and termination of a majority of the interLATA calls that would originate in the combined region.

A. The Principal Effect Of The Merger Will Be To Further Entrench Applicants' Bottleneck Monopolies By Consolidating Their Anticompetitive Practices -- As The SBC/PacTel Merger Showed

Applicants assert that their proposed combination will enhance in-region competition because it will allow them to achieve efficiencies that will enable them to "continue and complete the opening of our local markets to competition" and "effectively compete with the myriad highly

[3] Ameritech Response to Comments on the Report and Recommendations of the United States Concerning the Line of Commerce Restriction, Civil Action No. 82-0192, at 23 (D.D.C. Apr. 24, 1987).

visible, technically-proficient and well financed competitors who are in our markets today." Application at 4-5. This description is a fantasy. There are no "myriad" effective competitors in their regions. Applicants have maintained their local monopolies since the adoption of the Act by abusing the market power resulting from their control of the bottleneck networks that are connected to each and every home and business, by repeatedly litigating to block rules governing access and interconnection to their networks, and by openly flouting the Act's requirements and the binding Commission regulations and judicial decisions applying those requirements. The proposed merger will only further entrench Applicants' local service monopolies by allowing them to share these "best practices" on how to exclude competitors.

1. Ameritech and SBC Currently Face No Effective Competition

Applicants claim that they need to create a monolith with $43 billion a year in revenues to compete with new entrants. As Applicants well know, however, they face no meaningful competition in their respective regions. That is why, despite their repeated statements regarding the number of competitors they face, Application at 19, 49; Carlton Aff. ¶ 12; Kahan Aff. ¶ 21-22; Affidavit of Jason Weller ("Weller Aff.") ¶ 7 (Application, Tab 29), and their Tables listing their "myriad highly visible, technically-proficient and well financed competitors," *see* Application, Tables 3-16, Applicants fail to provide any market share data.[4] These data unambiguously show almost nonexistent market share for new entrants. For example, even taking

[4] Applicants all but concede they face no local competition when they argue that the Commission should not focus on "'direct' sources of competition" such as "how many entrants are competing for local exchange service using their own facilities, unbundled network elements . . ., or resale." Gilbert/Harris Aff. ¶ 21. Rather, Applicants plead for the Commission to consider "alternative modes of communication" -- modes that Applicants concede do *not* yet offer a competitive alternative to Applicants' landlines. *Id.* ¶¶ 15-22.

at face value SBC's extravagant and undocumented claim that it provides 255,011 resold lines and 261,051 "facilities-based" lines in California[5] -- the nation's most lucrative telecommunications market -- SBC still controls approximately 96 percent of its market in that State.[6] Likewise, Ameritech's claims about the success of new entrants -- 635,000 resold lines and 94,600 unbundled loops region-wide[7] -- amount to little more than 3 percent of its switched access lines.[8] A recent study by the Consumer Federation of America estimates that local competition affects little more than one percent of the local market and an even lower percentage of residential service. Consumer Federation of America, *Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996* 20 (1998).

Nor are these figures likely to change in the near term because the Act's principal vehicles for fostering immediate local competition are currently not viable. Without the availability of combinations of network elements, as a result of the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*,[9] the major interexchange carriers ("IXCs") have been forced to abandon broad-based entry that relies on the use of incumbent LECs' facilities. Likewise, even USN -- the "poster child" for reselling local services -- has announced that it is abandoning that means of entering the local market because the discounts provided by incumbent LECs have made this

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[5] Affidavit of Stephen Carter ("Carter Aff."), Att. 1 (Application, Tab 15).

[6] SBC controls 17,231,160 switched access lines in California. Preliminary Statistics of Communications Common Carriers at 141 (1997).

[7] Appenzeller Aff. ¶ 58. Ameritech is unable, or unwilling, to provide the number of "facilities based" access lines provided by new entrants in its territory.

[8] Ameritech controls 20,079,749 switched access lines region-wide. Preliminary Statistics of Communications Common Carriers at 137-38 (1997).

[9] 117 F.3d 1068 (8th Cir.), *on rehearing*, 120 F.3d 753, *cert. granted*, 118 S. Ct. 879 (1998).

means of entry uneconomical.[10] And given its staggering costs, extensive facilities-based competition in Applicants' regions is still at best years away. *See* DOJ/FTC Horizontal Merger Guidelines § 3.1 ("only committed entry alternatives that can be achieved within two years from initial planning to significant market impact" are relevant for determining potential of entry to mitigate the anticompetitive impact of a merger).

The absence of competition is further confirmed by Applicants' own financial statements. Ameritech has reported return on equity of 28.5 percent (1997), 28.7 percent (1996) and 29.5 percent (1995). Ameritech 1997 10-K at 21. SBC's reported return on equity is similarly excessive for a supposedly rate-regulated monopolist: 14.75 percent (1997), 33.73 percent (1996), and 23.97 percent (1995). 1997 SBC Audited Financial Statements at 18 (Application, Tab 26). With such returns, it is no wonder Applicants have shown no willingness or incentive to open their local markets to competition.

Applicants' self-serving claims of "tremendous losses of business" in the "profitable core of their operations," Application at 49, likewise collide with reality. In its 1997 Annual Report, SBC observes that its over $1.4 billion in earnings and its approximately $1.6 billion in revenue growth was "driven by local service growth" and -- despite the supposed competitive onslaught of new entrants -- that SBC's total access lines continued to increase apace. SBC 1997 Audited Financial Statements at 18-20. Ameritech likewise continues to enjoy strong, steady growth in its local markets and the number of access lines it provides. Ameritech 1997 10-K at 2, 24. None of this is news to the Commission. The Commission rejected each of Applicant's requests for

[10] *See* Troubles of USN Call into Question Viability of Local Resale at Current Discounted Rates, Telecommunications Reports, at 5 (Sept. 14, 1998).

authorization to provide in-region interLATA services pursuant to Section 271 of the Act, 47 U.S.C. § 271, on the ground that their local exchange markets were not yet open to competition.[11]

2. The Merger Will Only Further Entrench These Monopolies by Permitting Applicants to Share "Best Practices" on How to Exclude Competitors

Applicants are correct, of course, that an effect of this merger -- indeed, its principal effect -- will be to strengthen enormously their position against potential competitors. But they are dead wrong in assuming that the strengthening of monopolists should be a goal of public policy or could serve the public interest.

In that regard, Applicants' tongue-in-cheek claim that they must combine in order to "continue and complete the opening of our local markets to competition," Application at 5, merely highlights the threats posed by this merger. Applicants have done all that is in their power to block local competition. Applicants have maintained their entrenched position as the dominant providers of local exchange and access service since the adoption of the Act through their control of their bottleneck local exchange facilities, through their perpetual litigation concerning the rules governing access and interconnection to their networks, the decisions of state arbitrators, and the constitutionality of the Act, and through open defiance of their legal obligations even after those obligations are judicially affirmed. The proposed consolidation will enable them to share those "best practices" on how to exclude competitors from their monopoly markets.

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[11] *See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* 12 FCC Rcd. 20543 (1997) ("*Ameritech Michigan Order*"); *In the Matter of SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma,* 12 FCC Rcd. 8685 (1997); *see also AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, *et seq.*, ¶ 8 n.35 (Sep. 28, 1998) ("*Qwest Order*") (noting that in its *Ameritech Michigan Order*, the Commission determined that Ameritech "had not demonstrated that its local markets were sufficiently open to competition and denied the application").

For example, within days of this Commission's decision denying its premature Section 271 application for Oklahoma, SBC filed suit in Wichita Falls, Texas, to have Section 271 declared a bill of attainder -- a result which would have enabled it to enter the long-distance market without first having to demonstrate that it had opened its local market to competition.[12] SBC took this action notwithstanding that it had (a) sought enactment of Section 271 and strongly supported passage of the Act, and (b) then successfully moved to have the Modification of Final Judgment ("MFJ") vacated without ever advising the MFJ Court that it was preparing to challenge the constitutionality of the very provision designed to replace that decree. And while SBC's theory has now been rejected by the Court of Appeals for the Fifth Circuit,[13] SBC continues to press that theory, continuing to seek a means of circumventing Section 271 rather than complying with it.

SBC has also advanced a host of frivolous appeals designed to delay state regulatory commission decisions that attempt to open up local markets to competition and to tie those issues up in endless litigation. A recent decision by a federal district court rejecting one of these competition-blocking appeals aptly summarizes SBC's scorched earth tactics:

> [The court is] troubled by SWBT's tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and, most importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case -- over seven hundred pages in total -- could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorious point.

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[12] *SBC Communications, Inc. v. FCC*, 1998 WL 119707 (N.D. Tex. 1998).

[13] *SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

Southwestern Bell Tel. Co. v. AT&T Communications *of the Southwest, Inc.*, No. A 97-CA-132 SS, slip op. at 31 (W.D. Tex. Aug. 31, 1998).

SBC has also used its enormous financial clout and buying power -- which would grow substantially if this merger were approved -- to coerce vendors to deny needed resources to new entrants, thus earning its title as the "Bully Bell." Christopher Palmeri, *Bully Bell*, Forbes (Apr. 22, 1996). For example, the day after AT&T informed the Public Utilities Commission of Texas ("Texas PUC") that it had engaged Ernst and Young to develop the critical operations support system ("OSS") interfaces used to electronically flow customer and operating information between AT&T and SBC, Ernst and Young suddenly withdrew from that project. Affidavit of Russell Morgan ("Morgan Aff.") ¶ 6 (attached hereto as Exhibit 1). As it turned out, on the very same day Ernst and Young withdrew from the project, the chairman of Ernst and Young received a call from SBC's chairman, Ed Whitacre, regarding Ernst and Young's work for AT&T. *Id.* ¶ 5. AT&T subsequently sought to depose Mr. Whitacre about his involvement in this matter, but the Texas PUC determined that such a deposition was not necessary because "[w]e've determined that there are violations of the public interest, one of which is the corporate behavior and attitude of Southwestern Bell" and that SBC's interference with AT&T's retention of Ernst and Young was "indicative" of a company that was not "interested in getting local competition off and operating in this state." *Id.*, Att. B at 328-29 (May 21, 1998 Open Meeting of Texas PUC). As a result of SBC's actions, the development of workable operating systems in Texas -- and AT&T's ability to compete in the Texas local exchange market -- have been substantially delayed. *Id.* ¶ 8. *Accord, Qwest Order* ¶ 6 n.31 (noting that the development of local competition required that new entrants have "nondiscriminatory access to a BOC's operations support systems").

SBC has also used its control of the local network to block competition. As the attached affidavit of James Washington describes, SBC has refused to obey not only its unmistakable duties under the Act but also repeated orders of the Texas PUC requiring SBC to provide collocation on just, reasonable, and nondiscriminatory terms. *See* Affidavit of James Washington ("Washington Aff.") ¶¶ 4-24 (attached hereto as Exhibit 2). AT&T's current experiences and the pre-merger efforts of Teleport Communications Group Inc. ("TCG") to obtain collocation cages in Texas demonstrate plainly SBC's anticompetitive practices. Beginning as early as 1993, TCG made numerous requests for physical collocation, but SBC responded with significant provisioning delays and inexcusably lengthy negotiation periods. *Id.* ¶¶ 9-19.

Moreover, the rates that SBC has imposed on TCG for collocated space are exorbitant and patently not cost-based. Several of TCG's applications for collocated space generated price quotes of over $200,000 each, with one virtual collocation quoted at $525,000. *Id.* ¶¶ 11 & n.3, 13. Recognizing that such charges could stifle facilities-based competition, the Texas PUC long ago ordered SBC to file tariffs containing just and reasonable rates for collocation, to be provided at timely intervals. *Id.* ¶¶ 12-17. SBC, however, flagrantly disobeyed that order, proposing tariffs that were rejected by the Texas PUC on *three* separate occasions. *Id.*[14] Faced with SBC's

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[14] On one of these occasions, SBC's actions elicited the following statement from the Chairman of the Texas PUC:

> I think if there's anything more central to facilitating facilities-based competition than physical collocation, then I don't know what it is. And so my thought on [SWBT's] tariff is, I thought we had resolved these issues a year ago. I looked back over our arbitration award a year ago and I thought it was very specific about things, and I am very frustrated that it has been interpreted in a manner that is not consistent with what we clearly voted last time around.

See Open Meeting of the Public Utilities Commission of Texas, at 8 (Tex. PUC Sep. 24, 1997) (statement of Chairman Wood) (Washington Aff., Att. B).